FILED
JUN 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1839

ASARCO INCORPORATED (formerly The American Smelting and Refining Company), *Appellant,*

v.

IDAHO STATE TAX COMMISSION, *Appellee*

On Appeal from the Supreme Court of Idaho

JURISDICTIONAL STATEMENT

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v.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Idaho is reported as *Am. Smelting & Refining* v. *Idaho St. Tax Com'm*, 592 P.2d 39 (Idaho 1979). Included as Appendix A are copies of that opinion (App. A, pp. 1-32); the unreported Memorandum of the District Court of the Fourth Judicial District of the State of Idaho, Ada County (the "State District Court") (App. A, pp. 33-34); the unreported Find-

ings and Conclusions of the State District Court (App. A, pp. 35-42); and the unreported Decision of the Idaho State Tax Commission (App. A, pp. 43-59).[1]

JURISDICTION

This proceeding involves the application of Idaho's corporate income tax statute. Appellant challenged the deficiencies asserted by the Idaho State Tax Commission on both statutory and constitutional grounds.[2]

Appellant's statutory arguments were upheld by the State District Court (App. A, pp. 33-34, 41-42) and, accordingly, that court did not reach the constitutional issues. In its March 12, 1979 decision, the Idaho Supreme Court reversed and held that certain dividends and other items of income were includable in Appellant's "business income" subject to tax in Idaho. (App. A, pp. 16-23) In addition to this business income issue, the Idaho Supreme Court also considered, but did not decide, a separate statutory question involving the three-factor formula used to determine the percentage of Appellant's business income to be apportioned to Idaho. (App. A, pp. 30-32) The

[1] The pages of the five appendices to this Statement have been separately bound and consecutively numbered. Where appropriate, references to a particular appendix will be followed by a page number indicating the location of the cited material in the appendices as a whole.

[2] Appellant raised the Federal constitutional issues on page 4 of its protest filed with the Idaho State Tax Commission, in paragraphs 3 and 4 of its Complaint filed in the State District Court and on pages 18-24 of the brief which it filed as Appellee in the Idaho Supreme Court.

Idaho Sureme Court therefore remanded the case to the State District Court to resolve this separate three-factor issue and to make the computations necessiated by the Idaho Supreme Court's decision with respect to the business income issue. (App. A, pp. 32) Included as Appendix B is a copy of the Remittitur of the Idaho Supreme Court, dated April 3, 1979.

In reversing the lower court with respect to the business income issue, the Idaho Supreme Court first rejected Appellant's statutory interpretation and then upheld the statute against Appellant's constitutional challenge. (App. A, pp. 23-30) The decision of the Idaho Supreme Court is final insofar as the constitutional questions presented here are concerned. The further proceedings on remand to the State District Court can neither affect these constitutional issues nor give rise to any additional Federal questions which could possibly be presented here. Because the decision below on the constitutional issues is final, that decision may now be appealed to this Court. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975); *Radio Station WOW* v. *Johnson,* 326 U.S. 120 (1945).

Included as Appendix C are copies of the Amended Notice of Appeal which Appellant filed in the State District Court on May 29, 1979, and the Amended Notice of Appeal which Appellant filed in the Idaho Supreme Court on the same date. This Jurisdictional Statement is being filed within 90 days of March 12, 1979, the date on which the Idaho Supreme Court rendered its decision upholding the constitutionality of the Idaho taxing statute as applied to the Appellant. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(2). *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* Sup. Ct. Docket No. 78-1201, juris-

diction noted May 14, 1979; *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978).

STATUTE INVOLVED

Section 63-3027 of the Idaho Code is set forth in Appendix D.

QUESTIONS PRESENTED

1. Whether a State may, consistently with the Commerce Clause of Article I, Section 8 of the Constitution of the United States and the Due Process Clause of the Fourteenth Amendment to the Constitution, tax, as part of a corporation's income from its business conducted within the taxing State, certain dividends received by that corporation where:

(a) The corporation is organized under the laws of another State and maintains its commercial domicile in still another State;

(b) the business activity of the corporation in the taxing State is limited to the operation and administration of certain mines and minor sales of secondary metals;

(c) the dividends are received outside the taxing State from investments managed, controlled, and physically located outside that State;

(d) the dividends are not needed to provide operating capital for the corporation's mining operations within the taxing State; and

(e) the dividends are paid out of foreign source earnings of the payor corporations.

2. Whether the answer to the first question is different where all factors are the same except that the income which the taxing State is attempting to tax consists of: (a) dividends paid out of domestic source earnings of the payor corporations; (b) foreign and domestic source interest received from investments in corporate debentures, notes, and other securities; or (c) foreign and domestic source capital gains from the sale of stock and securities giving rise to such dividend and interest income.

STATEMENT OF THE CASE

ASARCO Incorporated, the Appellant, is engaged in the business of mining, smelting, refining and selling non-ferrous metals. Appellant is incorporated in New Jersey, maintains its headquarters or "commercial domicile" in New York, and conducts business in a number of other states, including Idaho. Appellant's principal business in Idaho is mining silver. In addition, Appellant mines lead and zinc, operates the administrative office for its northwest mining division, and sells small amounts of secondary metals in Idaho. Appellant's smelting, refining and other activities are conducted elsewhere. (App. A, pp. 36-38; Stip. ¶¶ 12, 14) [3]

During the years in issue, 1968 through 1970, Appellant received sizeable dividends from a number of corporations at its commercial domicile in New York.[4]

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[3] "Stip." references are to the Stipulation filed in the State District Court proceeding.

[4] All corporate stocks, bonds and other evidences of indebtedness owned by Appellant are physically sited in New York. (Stip. ¶ 14) Appellant received $50,542,626 of dividends in 1968,

Some of the corporations paying the dividends were controlled by Appellant; others were independently managed. Some of the corporations engaged in activities outside the United States which generated foreign source earnings. In almost all instances, the parties stipulated that the corporations paying the dividends made no sales or purchases in Idaho, had no representatives or agents in Idaho, and conducted no business activity in Idaho during the years in issue. (App. A, pp. 35, 38-40; Stip. ¶ 9(a))[5]

Appellant's largest foreign source dividends came from M.I.M. Holdings, Ltd. (hereinafter "M.I.M.") which paid almost $64 million in dividends to Appellant during the three years in issue. M.I.M. is a major corporation engaged in mining, milling, smelting and refining in Australia and in England. Appellant owned 53% of the stock of M.I.M. in 1968 and 52.7% in 1970, with the balance of the stock being widely held. M.I.M. operates entirely independently of and has minimal contact with Appellant. (App. A, p. 40; Stip. ¶¶ 5, 11; Tr. 69-73)[6] Appellant's largest dividends from domestic sources, totalling over $13 million during the three years in issue, were received from General Cable, an independent, publicly-owned corporation. Appel-

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$69,519,428 in 1969, and $64,762,970 in 1970. A schedule of these dividends, taken from paragraph 11 of the Stipulation, is set forth in Appendix E.

[5] In a few instances, no information was available with respect to the sales and business activities of the payor corporations in Idaho. (Stip. ¶ 9(b)) There was no evidence or assertion, however, that any of the corporations did conduct business in Idaho.

[6] "Tr." references are to the Reporter's Transcript of the State District Court proceeding.

lant owned approximately 34% of General Cable's stock during the years in issue until the stock was sold in 1970.[7] (App. A, p. 40; Stip. ¶¶ 5, 6, 11; Tr. 73-76)

In addition to its dividend income, Appellant received interest income at its New York commercial domicile from investments in corporate debentures, notes from the sale of stock investments, and other marketable securities. During the years in issue, Appellant also received capital gains from the sale of M.I.M. stock, General Cable stock, and other securities.[8] The disposition of the dividend, interest and capital gain income was determined by Appellant outside Idaho, and, in each instance, the income was not needed to provide working capital in Appellant's mining operations. (App. A, pp. 37-38)

In filing its Idaho tax return for 1969 and 1970, Appellant apportioned its operating business income between sources within and without Idaho on the basis of the three-factor formula prescribed pursuant to Idaho Code § 63-3027. (See App. D, pp. 67-69)[9] This three-factor formula attributed to Idaho that fraction of Appellant's total "business income" which was the average of the fractions of Appellant's total tangible property, payroll, and sales attributable to Idaho. Appellant believed that all of its dividend income, some

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[7] Appellant made sales to General Cable. But, there was no significant change in the sales pattern after Appellant sold its General Cable stock. (Stip. ¶ 4; Tr. 76)

[8] A schedule of the interest income and capital gains, taken from paragraph 11 of the Stipulation, is set forth in Appendix E.

[9] For 1968, Appellant reported its Idaho tax using a separate accounting, rather than an apportionment, method. (Stip. ¶ 3)

of its interest income and all of its capital gains constituted non-business income.[10] Accordingly, instead of including these amounts in its apportionable income, Appellant allocated them to New York, its commercial domicile, pursuant to Idaho Code § 63-3027 (f)(3) and (g). (App. D, pp. 65-66) As a result, Appellant's Idaho taxable income for 1968 and 1969 was reported as $419,876 and $127,775, respectively. (Tr. 130)

On audit, the Idaho State Tax Commission determined that all of Appellant's dividend, interest and capital gain income was includible in its apportionable business income. Because of the large amounts involved (see Appendix E), this adjustment increased Appellant's Idaho taxable income to $2,274,750 in 1969 and $2,162,340 in 1970. (App. A, p. 36)

Appellant challenged the inclusion of the dividend, interest and capital gain income in its apportionable business income on both statutory and constitutional grounds. The Idaho State Tax Commission rejected both of these challenges. (App. A, pp. 50-58) As indicated above, the State District Court upheld Appellant's statutory argument without reaching the constitutional issues (App. A, pp. 33-34, 41-42), and the Idaho Supreme Court reversed, rejecting most of Appellant's statutory arguments (App. A, pp. 9-23) and

[10] Appellant also believes that its income from rents and royalties should not be included in apportionable business income. (App. A, pp. 41-42) However, in view of the relatively small amounts involved, Appellant has decided not to appeal from the Idaho Supreme Court's decision to include these items in apportionable income. (App. A, p. 21)

all of its constitutional arguments (App. A, pp. 23-30).[11]

REASONS FOR NOTING JURISDICTION

This case involves several substantial Federal questions. The first is whether a State may constitutionally tax dividends paid to a resident corporation out of foreign source earnings of non-resident corporations having no contact with the taxing State.[12] That precise issue is presently before this Court in *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont, supra.* The Court should note jurisdiction in the present case in order to further consider that issue in light of the circumstances of this case, and to consider the additional and closely-related issues which are raised here.

(1) Constitutionality of State Taxation of Dividends Paid to a Resident Corporation Out of Foreign Source Earnings of Non-Resident Domestic and Foreign Corporations Having No Contacts with the Taxing State.

Insofar as Appellant's foreign source dividend income is concerned, this case involves the same constitutional questions as are presented in the *Mobil* case, *supra.* Each case draws into question the con-

[11] The Idaho Supreme Court did hold that a small portion of Appellant's dividend income constituted non-business income which was not subject to apportionment under the Idaho Code. (App. A, p. 20)

[12] As used herein, the term "resident" corporation means a corporation which is doing business within the taxing State, but is organized under the laws of some other State and has its headquarters or commercial domicile in some other State. The term "domestic" corporation means a corporation organized under the laws of one of the States, and the term "foreign" corporation means a corporation organized under the laws of a foreign country.

stitutionality of a State income tax imposed on dividends paid to a resident corporation by non-resident domestic or foreign corporations which derive their income from foreign sources and have no contacts of any kind with the taxing State. In this case, Idaho seeks to tax foreign source dividends received by Appellant at its commercial domicile in New York from sources in Australia, Mexico, Chile and Peru.[13]

(a) *Due Process Clause.* As was the case with Vermont in *Mobil,* Idaho seeks, contrary to the Due Process Clause, to tax Appellant's extraterritorial dividend income through the guise of purporting to measure (by apportionment) the income attributable to Appellant's mining and sales activities conducted within Idaho. However, the requisite nexus between Appellant's investment and holding company activities at its commercial domicile in New York and its business activities in Idaho is missing. Based on a statutory presumption,[14] the Idaho Supreme Court reversed the State District Court and held that Appellant's foreign source dividend income in issue here constituted "business income" subject to apportionment. (App. A, pp. 17-20) But the statutory presumption relied upon by the Idaho Supreme Court should not enable Idaho to treat Appellant's mining and sales activities (which generate operating revenue) and its investment and holding company activities (which generate dividend

[13] The Idaho Supreme Court apportioned Appellant's foreign source dividends from M.I.M., ASARCO Mexicana, S.A., Compania American Smelting, S.A. (all foreign corporations) and Southern Peru Copper Corporation (a domestic corporation). These four corporations operated in Australia, Mexico, Chile, and Peru, respectively. (App. A, pp. 19-20; Tr. 37, 55, 65, 69)

[14] See Idaho Code § 63-3027(a)(1). (App. D, p. 63)

income) as all being part of a single unitary business conducted both within and without Idaho.[15] Thus, this case is distinguishable from cases such as *Moorman Mfg. Co.* v. *Bair, supra; Butler Bros.* v. *McColgan,* 315 U.S. 501 (1942); and *Bass, Ratcliff & Gretton* v. *State Tax Commission,* 266 U.S. 271 (1924), all of which involved truly unitary businesses of one corporation.

Alternatively, even if there were some basis for including Appellant's foreign source dividend income in its apportionable income in order to determine Appellant's income from its business activities in Idaho, the result reached under the Idaho statute would still contravene the Due Process Clause. As the State District Court found below, that result apportions arbitrarily to Idaho an amount "which does not reflect and greatly exceeds an amount which would accurately reflect Plaintiff's business in Idaho." (App. A, pp. 40-41)[16] Such a result is impermissible under the Due

[15] M.I.M., for example, operated entirely independently of Appellant. (App. A, p. 40) Southern Peru Copper Corporation, by comparison, does business with Appellant. But the record indicates that this business is conducted on an arms' length basis and that the income effect of these contacts, insofar as Appellant is concerned, is fully reflected in Appellant's operating revenues and need not also be taken into account through Appellant's dividend income. (Tr. 59-63) The same is also true with respect to the other subsidiaries which do business with Appellant. See *Gulf Oil Corp.* v. *Clayton,* 267 N.C. 15, 147 S.E.2d 522 (1966).

[16] This results, in part, from Idaho's arbitrary attempt to include over $100 million of dividends in apportionable business income during the years in issue (see App. E) while, at the same time, failing to make consistent or correlative adjustments to the three-factor apportionment fraction to reflect Appellant's investment in the subsidiaries paying the dividends, or Appellant's pro rata share of the property, payroll, and sales of those subsidiaries. See *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N.Y.

Process Clause. *Hans Rees' Sons, Inc.* v. *North Carolina ex rel Maxwell,* 283 U.S. 123 (1931); *Norfolk & Western Ry. Co.* v. *Missouri State Tax Commission,* 390 U.S. 317 (1968). See *Moorman Mfg. Co.* v. *Bair, supra.* This alternative issue (involving the relationship between the determination of the apportionable business income base and the apportionment fraction) is not raised in Mobil's Jurisdictional Statement, and thus constitutes an additional reason for noting jurisdiction in this case.

(b) *Commerce Clause.* Idaho's statute as applied here by the Idaho Supreme Court also contravenes the Commerce Clause. As in *Mobil,* Appellant contends that the statute places an impermissible burden on foreign commerce by (1) taxing an activity (*viz.,* the investment in corporations operating abroad and the receipt of foreign source dividends) which lacks a substantial nexus to Idaho, (2) discriminating against foreign commerce by subjecting it to the risk of multiple taxation by the States,[17] and (3) impairing Federal uniformity in regulating commercial relations with foreign governments. *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977); *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276 (1976). In addition to these infirmities, which are also involved in the *Mobil* case, the

48, 129 N.E. 202 (1920), per Cardozo, J. This point was noted, but not passed upon, in *Bass, Ratcliff & Gretton* v. *State Tax Commission, supra,* 266 U.S. at 284-285.

[17] As is explained in detail in Mobil's Jurisdictional Statement (pp. 16-19), apportioning the dividends as business income creates a risk of multiple taxation by the States since the dividends also are fully allocable to the State of commercial domicile. See, e.g., *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 125 F.2d 571 (10th Cir.), *cert. denied,* 316 U.S. 668 (1942).

risk of impermissible multiple taxation is even more dramatically presented in this case since Idaho's tax "creates more than the *risk* of multiple taxation; it produces multiple taxation in fact." *Japan Line Ltd.* v. *County of Los Angeles,* —— U.S. —— (decided April 30, 1979). Appellant was subject to Mexican and Australian withholding taxes on the dividends which it received from corporations operating in those countries.[18] The decision below allows Idaho to impose a second tax on the same dividend income. Appellant submits that this "double tax" is unconstitutional. *Japan Line Ltd.* v. *County of Los Angeles, supra.*

Because the taxation of foreign source dividend income of resident corporations was discussed at length in Mobil's Jurisdictional Statement, and because the Court has already agreed to hear that case on the merits, Appellant assumes that further discussion of the importance of this issue is neither necessary nor appropriate in the present case at this juncture. However, because this case involves considerations which appear not to be involved in *Mobil,* Appellant believes that it could make a significant additional contribution to the Court's understanding and resolution of the issue by filing a brief on the merits and presenting oral argument.

[18] The Income Tax Law of Mexico (Articles 60, V and 73, I) subjected such dividends to a tax which was imposed on the recipient (Article 61), but was withheld by the payor (Article 74). Similarly, Australia imposed a withholding tax (Income Tax Assessment Act, 1936-1973, Secs. 128A and 128B) on dividend payments by resident companies to non-residents, and required the payor company to withhold the tax before the dividend was paid (Income Tax Assessment Act, 1936-1973, Sec. 221,YL).

(2) Constitutionality of State Taxation of Dividends Paid to a Resident Corporation Out of Domestic Source Earnings of Corporations Having No Contacts with the Taxing State.

In the *Mobil* case, over 99% of the dividend income at issue in the State court proceedings was paid to Mobil by corporations "deriving all, or all but an insignificant portion, of their income from sources outside the United States."[19] Mobil's Jurisdictional Statement in this Court confined the Questions Presented to situations involving dividends "derived from foreign source earnings of the payor corporations."[20] The two Argument headings in the Jurisdictional Statement referred to "Foreign Source Dividends" and "Dividends Paid Out of Foreign Earnings."[21] Thus, the only issue before this Court in the *Mobil* case is the constitutionality of State income taxes imposed on the foreign source dividend income of a resident corporation.

In addition to raising that issue, the present case raises the related question as to whether a State may constitutionally tax dividends paid to a resident corporation out of the *domestic* earnings of a corporation having no contacts of any kind with the taxing State.[22]

(a) *Due Process Clause.* Insofar as the Due Process Clause is concerned, Appellant believes that a State

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[19] *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont*, Sup. Ct. Docket No. 78-1201, Jurisdictional Statement p. 5.

[20] *Id.*, p. 2.

[21] *Id.*, pp. 9, 11.

[22] The Idaho Supreme Court apportioned Appellant's U.S. source dividends from General Cable and Revere Copper and Brass. (App. A, p. 19; Tr. 73)

has no more constitutional authority to tax dividends paid to a resident corporation at its commercial domicile by corporations operating in other States than it does to tax dividend income received at the commercial domicile from corporations operating in foreign countries. The State's asserted tax operates equally in both instances "to reach profits which are in no just sense attributable to transactions within its jurisdiction." *Hans Rees' Sons, Inc.* v. *North Carolina ex rel. Maxwell, supra,* 283 U.S. at 134. In each instance, the State is clearly seeking to extend its tax to reach "extraterritorial values." *Butler Bros.* v. *McColgan, supra,* 315 U.S. at 507.

Appellant's Idaho mining business has no more association with Appellant's domestic source dividend income than with its foreign source dividend income. For example, during 1968-1970, the taxable years at issue here, Appellant received sizeable dividends from both M.I.M. and General Cable at its commercial domicile in New York. Both of these companies were publicly-held, independently managed mining or manufacturing concerns with no asserted business contacts of any kind in Idaho. In each instance, Appellant's investment in the companies was managed and administered entirely from outside Idaho, and none of the dividends which Appellant received were needed for reinvestment in Appellant's Idaho mining operations. (App. A, pp. 38, 40) Since Idaho's jurisdiction to tax Appellant rests solely on the fact that Appellant operates a mine in Idaho and conducts related business there, Idaho's ability to reach out and tax Appellant's dividend income from unrelated out-of-state enterprises is surely no greater in the case of General Cable than in the case of M.I.M. merely because the

former company operates in the United States whereas the latter operates in Australia. Dividend income earned and sourced in New England is just as far beyond the taxing jurisdiction of Idaho as dividend income from Australia.

(b) *Commerce Clause.* This Court's most recent decision in the State tax area makes it clear that, under the Commerce Clause, the constitutional restraints on State taxation are greater where foreign commerce is involved than they are where the commerce is solely among the States. See *Japan Line, Ltd.* v. *County of Los Angeles, supra.* The present case affords an excellent opportunity to test the limits of that concept, and to determine whether it also applies where a State seeks to tax both the domestic and foreign source dividends of a resident corporation.

Appellant contends that the Commerce Clause prohibition against multiple taxation of domestic source dividends arising out of interstate commerce is no less than the prohibition against multiple taxation of foreign source dividends arising out of foreign commerce. It is true that foreign source dividends present a greater opportunity for multiple taxation since, as is the case here, these dividends are frequently subject to foreign withholding taxes. However, the risk of multiple taxation of domestic source dividends by the various States, as a consequence of both apportionment and the ability of the State of commercial domicile to tax the dividends in full, is sufficient to constitute an impermissible burden on interstate commerce.

It is also true that the United States has entered into treaties which provide for a reduction in the normal rate of foreign withholding tax on dividends

paid to U.S. investors,[23] and that Congress has provided for a foreign tax credit to eliminate, or at least reduce, the double taxation of foreign source dividend income at the Federal level.[24] But Congress has also taken comparable action to avoid double taxation of domestic inter-company dividend income at the Federal level by providing for an 85 or 100 percent dividends received deduction.[25] Thus, it appears that multiple taxation of domestic dividends is regarded as imposing no less significant a burden on interstate commerce than comparable multiple taxation of foreign source dividends imposes on foreign commerce.

Having already decided to resolve the constitutional status of foreign source dividend income, this Court

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[23] See the Income Tax Treaties between the United States and: Australia (Article VII); Austria (Article VI); Belgium (Article 10); Canada (Article XI); Denmark (Article VI); Finland (Article 12); France (Article 9); Germany (Article VI); Iceland (Article 12); Ireland (Article VI); Italy (Article VII); Japan (Article 12); Luxembourg (Article IX); Netherlands (Article VII); New Zealand (cf. Article VI(2)); Norway (Article 8); Pakistan (Article VI); Poland (Article 11); Romania (Article 10); Sweden (Article VII); Switzerland (Article VI); Trinidad and Tobago (Article 12); and United Kingdom (Article VI). Similar provisions are contained in a number of treaties which have been signed, but not yet ratified. See the pending United States income tax treaties with Brazil (Article 12); Hungary (Article 9); Israel (Article 12); Korea (Article 12); Morocco (Article 10); Philippines (Article 11); Thailand (Article 9); and United Arab Republic (Article 11). The text of all of the foregoing treaties may be found in the Commerce Clearing House, Inc. and Prentice-Hall, Inc. Tax Treaties services. Treaties in force are also reproduced in the Department of State multi-volume publication entitled "United States Treaties and Other International Agreements."

[24] See Internal Revenue Code of 1954, sections 901-904.

[25] See Internal Revenue Code of 1954, sections 243-245.

should not leave the status of domestic source dividend income unresolved. As matters now stand, there is a clear-cut split of authority among State courts on the question of whether a State may constitutionally tax a resident corporation on dividends received from corporations operating entirely within other States. Compare, e.g., *Square D Co.* v. *Kentucky Board of Tax Appeals,* 415 S.W. 2d 594 (Ky. 1967) and *Gulf Oil Corp.* v. *Clayton,* 267 N.C. 15, 147 S.E. 2d 522 (1966) holding such taxation of dividends to be unconstitutional, with *F. W. Woolworth Co.* v. *Director of Div. of Taxation,* 45 N.J. 466, 213 A.2d 1 (1965) and the decision below holding such taxation of dividends to be constitutional. A definitive resolution of this issue is extremely important because at least 26 States and the District of Columbia presently assert taxing jurisdiction in such cases,[26] and the potential tax revenues are enormous.

(3) Constitutionality of State Taxation of a Resident Corporation's Foreign and Domestic Source Interest Income from Investments and Capital Gains from the Sale of Stock and Securities Giving Rise to Dividend and Interest Income.

Mobil involves only dividend income; the present case also involves interest income from investments and capital gains from the sale of securities giving rise to dividend and interest income. Appellant derived such interest income and capital gains from both foreign and domestic sources. (See, App. E)

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[26] The States asserting jurisdiction to tax, and the relevant statutory provisions, are listed in Appendix F to Mobil's Jurisdictional Statement.

(a) *Due Process Clause.* There are many cases in which State courts have considered whether a resident corporation's interest income or capital gains from intangibles are sufficiently related to the corporation's activities within the taxing State to justify apportionment. See, e.g., *People ex rel. Alpha Portland Cement Co.* v. *Knapp, supra; Champion International Corp.* v. *Bureau of Revenue,* 88 N.M. 411, 540 P.2d 1300 (1975); *Sperry and Hutchinson Co.* v. *Department of Revenue,* 270 Ore. 329, 527 P.2d 729 (1974); and *Commonwealth* v. *ACF Industries, Incorporated,* 441 Pa. 129, 271 A.2d 273 (1970). By noting jurisdiction, this Court has the opportunity to consider this question and determine whether the tests to be applied with respect to dividends also apply equally to interest and capital gains.

Appellant contends that the result under the Due Process Clause should be the same since, in each instance, Idaho is making the same impermissible attempt to tax "extraterritorial values." *Butler Bros.* v. *McColgan, supra* at 507. Appellant's domestic source interest from its Revere Copper and Brass debentures (App. E, p. 72), its foreign source interest from the notes it received on a prior sale of ASARCO Mexicana, S.A. stock (App. E, p. 72; Tr. 66), and its foreign source capital gain from the sale of M.I.M. stock (App. E, p. 73), were no more related to Appellant's business conducted in Idaho than Appellant's dividend income from those same companies. All of the income was received outside of Idaho as a consequence of decisions and actions taken outside of Idaho and none of it was needed for the mining business conducted within Idaho. (App. A, pp. 37-38)

(b) *Commerce Clause.* The issues relating to interest and capital gain income under the Commerce Clause are also comparable to the issues relating to dividend income. In particular, there is the same potential for multiple taxation—both as a result of foreign withholding taxes [27] and as a result of the diverse methods employed by the States in allocating or apportioning income. As with dividends, some States (e.g., Louisiana) fully allocate interest and capital gain to the State of commercial domicile; some States (e.g., Massachusetts) fully apportion interest and capital gain income (whether business or non-business); and some States (including Idaho) allocate non-business interest and capital gains while apportioning business interest and capital gains.[28]

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[27] See, e.g., Income Tax Law of Mexico, Article 65 with respect to the interest on the notes received by Appellant in connection with the sale of its ASARCO Mexicana, S.A. stock.

[28] La. Rev. Stat. Ann. §§ 47:241-243; Mass. Gen. Laws Ann. Ch. 63, §§ 38(a), 39, 42A; Idaho Code § 63-3027(a), (f)(3), (g).

CONCLUSION

This case presents the same constitutional issues as the *Mobil* case. For that reason alone, this Court should note probable jurisdiction so that similarly situated taxpayers will receive equal treatment. In addition, this case also raises significant related issues not presented by *Mobil*. Accordingly, probable jurisdiction should be noted, and this case should be scheduled for plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

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